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FOR THE FIRST CIRCUIT

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NOTICE OF PROPOSED AMENDMENT TO LOCAL RULES 32.3 AND 36

The United States Court of Appeals for the First Circuit hereby provides notice that it proposes amendments to Local Rule 32.3 ("Citation of Unpublished Opinions") and 36 ("Opinions"). These amendments are proposed in light of new Fed. R. App. P. 32.1, which will take effect December 1, 2006 absent Congressional action. The text of Fed. R. App. P. 32.1 is:

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

- (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
- (ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

As proposed, Local Rule 32.3 is re-written and re-numbered as Local Rule 32.1.0. The amended rule draws no distinction between dispositions issued by this court before January 1, 2007 and those issued on or after that date. Other courts may draw such a distinction, and the amended rule requires litigants to comply with the rules of the issuing court.

The proposed modifications to Local Rule 36 are designed to bring the rule into conformity with new Fed. R. App. P. 32.1. The amended rule retains this court's policy that unpublished dispositions have no precedential value.

The proposed amendments are attached. Additions are noted in *italic* print; deletions are shown in ~~strike-out~~ print. The Court of Appeals invites public comments on the proposed amendments. Comments should be received by October 20, 2006, and addressed to:

Office of the Clerk
U.S. Court of Appeals for the First Circuit
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 2500
Boston, Massachusetts 02210

September 20, 2006

Richard Cushing Donovan

Rule 32.3. Citation of Unpublished Opinions

(a) An unpublished opinion of this court may be cited in this court only in the following circumstances:

- ~~———— (1) ——— When the earlier opinion is relevant to establish a fact about the case. An unpublished opinion of this court may be cited to establish a fact about the case before the court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, abuse of the writ, or other similar doctrine.~~
- ~~———— (2) ——— Other circumstances. Citation of an unpublished opinion of this court is disfavored. Such an opinion may be cited only if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that adequately addresses the issue. The court will consider such opinions for their persuasive value but not as binding precedent.~~
- ~~———— (3) ——— Procedure. A party must note in its brief or other pleading that the opinion is unpublished, and a copy of the opinion or disposition must be included in an accompanying addendum or appendix.~~
- ~~———— (4) ——— Definition. Almost all new opinions of this court are published in some form, whether in print or electronic medium. The phrase "unpublished opinion of this court" as used in this subsection and Local Rule 36(c) refers to an opinion (in the case of older opinions) that has not been published in the West Federal Reporter series, e.g., F., F.2d, and F.3d, or (in the case of recent opinions) bears the legend "not for publication" or some comparable phraseology indicating that citation is prohibited or limited.~~

(b) Unpublished or non-precedential opinions of other courts, as defined or understood by those courts, may be cited in the circumstances set forth in subsection (a)(1) above. Such opinions may also be cited in circumstances analogous to those set forth in subsection (a)(2) above, unless prohibited by the rules of the issuing court. If an unpublished or non-precedential opinion of another court is cited, the party must comply with the procedure set forth in subsection (a)(3) above.

Amended Local Rule 32.3 (to be re-numbered as Local Rule 32.1.0)

Rule 32.1.0 Citation of Unpublished Dispositions

- (a) *Disposition of this court. An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. A party must note in its brief or other filing that the disposition is unpublished. The term "unpublished" as used in this subsection and Local Rule 36(c) refers to a disposition that has not been selected for publication in the West Federal Reporter series, e.g., F., F.2d, and F.3d.*
- (b) *Dispositions of other courts. The citation of dispositions of other courts is governed by Fed. R. App. P. 32.1 and the local rules of the issuing court. Notwithstanding the above, unpublished or non-precedential dispositions of other courts may always be cited to establish a fact about the case before the court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, abuse of the writ, or other similar doctrine.*

Local Rule 36. Opinions

- (a) Opinions Generally. The volume of filings is such that the court cannot dispose of each case by opinion. Rather it makes a choice, reasonably accommodated to the particular case, whether to use an order, memorandum and order, or opinion. An opinion is used when the decision calls for more than summary explanation. However, in the interests both of expedition in the particular case, and of saving time and effort in research on the part of future litigants, some opinions are rendered in unpublished form; that is, the opinions are directed to the parties but are not otherwise published in *West's Federal Reporter* the official West reporter, and may not be cited except as provided in Local Rule 32.3. As indicated in Local Rule 36(b), the court's policy, when opinions are used, is to prefer that they be published; but in limited situations, described in Local Rule 36(b), where opinions are likely not to break new legal ground or contribute otherwise to legal development, they are issued in unpublished form.
- (c) Precedential Value of Unpublished Opinions. While an unpublished opinion of this court may be cited to this court in accordance with ~~Local Rule 32.3(a)~~ *Fed. R. App. P. 32.1* and *Local Rule 32.1.0*, a panel's decision to issue an unpublished opinion means that the panel sees no precedential value in that opinion.